Baiduri Bank Bhd v The Official Receiver (the trustee for the property of Kumariah bt Hj Sirat, a bankrupt)

COURT OF APPEAL (BRUNEI DARUSSALAM) — CIVIL APPEAL NO 15 OF 2008
POWER PCA, MORTIMER AND DAVIES JJCA
16 MAY 2009

Bankruptcy — Property available for distribution — Salary — Assignment of future salary made for consideration — Whether assignment of salary earned after act of bankruptcy ineffective against official receiver — Whether assignee under assignment secured creditor

Equity — Assignment — Assignment of future property — Assignment of future income made for consideration — Income payable under future contracts — Conditions for effective assignment of future property

On 12 March 2004, the debtor accepted credit facilities offered by the bank and on that same day executed a deed of assignment, inter alia, assigning her future monthly salaries to the bank. On 2 April 2003, the debtor committed an act of bankruptcy and on 24 August 2006, she was adjudged a bankrupt. In consequence thereof, her property became divisible among her creditors and became vested in her trustee, the official receiver. The main question for the court's determination was whether salary earned by the debtor after the date of her act of bankruptcy vested in her trustee and so became divisible among her creditors or whether it was the property of the bank pursuant to the deed of assignment.

Held, dismissing the appeal with costs:

(1) In equity, future property is capable of assignment. In the instant case, the property claimed by the bank was salary earned pursuant to contracts entered into by the debtor after her bankruptcy. Thus the property was future property and the right to it would not arise until some time in the future and only if the assignor chose to enter into such future contracts by continuing or changing her employment. The bank's right to secure the property under the assignment (the future salary) required further acts by the assignor (the debtor). However, it is the essence of the equitable principle 'that equity considers as done that which ought to be done' that in order that an assignment of future property be effective, there must be nothing further required to be done by the assignor to perfect it. In the instant case, in order to create the

right to the income under the assignment, the debtor had to choose to continue in or change her employment. However in the instant case, the bankruptcy intervened before the debtor could enter into the contracts (see paras 5, 9–12); *The Judicial Manager (L & L) Engineering Corporation Sdn Bhd (under Judicial Management) v Baiduri Bank Bhd* (Civil Appeal No 17 of 2006) referred; *Tailby v The Official Receiver* (1888) 13 App Cas 523 referred; *Re Lind, Industrials Finance Syndicate v Lind* [1915] 2 Ch 345 referred; *Wilmot v Alton and another* [1897] 1 QB 17 referred.

(2) The deed of assignment was ineffective against the official receiver to assign any part of salary earned after the act of bankruptcy. If it was ineffective to assign future salary it could not make the bank a secured creditor of the debtor, in respect of that salary, at the date of her bankruptcy. For the bank to be a secured creditor there must have been property of the debtor, at the time of her bankruptcy, to which such security could attach. In the instant case, there was in existence at the time of bankruptcy no equitable right in respect of future property for which value had been given (see para 14); *Holy Rosary Parish (Thorold) Credit Union Ltd v Premier Trust Co* [1965] SCR 503 not followed.

[Bahasa Malaysia summary

Pada 12 Mac 2004, penghutang menerima kemudahan kredit ditawarkan oleh pihak bank dan pada hari yang sama telah menandatangani satu surat ikatan penyerahhakkan, antara lain, menyerahhak gaji-gaji bulanan masa depannya kepada bank tersebut. Pada 2 April 2003, penghutang melakukan satu tindakan kebankrapan dan pada 24 Ogos 2006, dia telah diputuskan bankrap. Akibat daripada itu, harta penghutang boleh dipecahbahagi di antara pemiutang-pemiutangnya dan terletakhak kepada pemegang amanahnya, pegawai penerima. Persoalan utama untuk diputuskan oleh mahkamah adalah sama ada gaji yang diperoleh oleh penghutang selepas tarikh tindakan kebankrapannya terletakhak kepada pemegang amanahnya dan boleh dipecahbahagi di antara pemiutang-pemiutangnya atau sama ada ia adalah harta bank di bawah surat ikatan penyerahhakkan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Dalam ekuiti, harta masa hadapan boleh untuk diserahhak. Dalam kes ini, harta yang dituntut oleh pihak bank ialah gaji yang diperoleh oleh penghutang menurut kontrak-kontrak yang dimasuki selepas kebankrapannya. Maka harta tersebut adalah harta masa hadapan dan hak terhadapnya tidak akan wujud sehingga masa akan datang dan hanya jika penyerahhak memilih untuk memasuki kontrak masa hadapan sedemikian dengan meneruskan ataupun menukar pekerjaannya. Hak pihak bank untuk mendapatkan harta di bawah penyerahhakkan tersebut (gaji masa depan) memerlukan

tindakan-tindakan selanjutnya oleh penyerahhak (penghutang). Walau bagaimanapun, ia adalah intipati prinsip ekuiti 'that equity considers as done that which ought to be done' bahawa bagi suatu penyerahhakkan harta masa hadapan menjadi berkesan, tiada apa-apa lagi yang harus dilakukan oleh penyerahhak untuk menyempurnakannya. Dalam kes ini, bagi mewujudkan hak untuk pendapatan di bawah penyerahhakkan tersebut, penghutang hendaklah memilih untuk terus atau menukar pekerjaannya. Walau bagaimanapun, dalam kes ini, kebankrapan telah berlaku sebelum penghutang boleh menandatangani kontrak-kontrak tersebut (lihat perenggan 5, 9–12); *The Judicial Manager (L & L) Engineering Corporation Sdn Bhd (Under Judicial Management) v Baiduri Bank Bhd* (Civil Appeal No 17 of 2006) dirujuk; *Tailby v The Official Receiver* (1888) 13 App Cas 523 dirujuk; *Re Lind, Industrials Finance Syndicate Limited v Lind* [1915] 2 Ch 345 dirujuk; *Wilmot v Alton and Anor* [1897] 1 QB 17 dirujuk.

(2) Surat ikatan penyerahhakkan tersebut tidak efektif terhadap pegawai penerima untuk menyerahhak mana-mana bahagian daripada gaji yang diperoleh selepas tindakan kebankrapan tersebut. Jika ia tidak efektif untuk menyerahhak gaji masa depan ia tidak boleh menjadikan bank sebagai pemiutang bercagar penghutang, berkaitan dengan gaji tersebut, pada tarikh kebankrapannya. Bagi pihak bank untuk menjadi pemiutang bercagar, hendaklah terdapat harta penghutang, pada masa kebankrapannya, yang mana cagaran tersebut boleh diikat. Dalam kes ini, pada masa kebankrapan tidak wujud sebarang hak ekuiti berkaitan dengan harta masa hadapan di mana nilai telah diberikan (lihat perenggan 14); *Holy Rosary Parish (Thorold) Credit Union Ltd v Premier Trust Co* [1965] SCR 503 tidak diikut.]

Notes

For a case on salary, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2928.
For cases on assignment generally, see 6 *Mallal's Digest* (4th Ed, 2009 Reissue) paras 2577–2597.

Cases referred to

de Marney, Official Receiver, Re, v Salaman [1943] 1 All ER 275, Ch D (refd)
Ex parte Salaman, Re Collins [1925] 1 Ch 556 (refd)
Ex parte Trustee of the Property of the Bankrupt v Performing Right Society and Soundtrac Film Co, Re Trytel [1952] 2 TLR 32 (refd)
Holy Rosary Parish (Thorold) Credit Union Ltd v Premier Trust Co [1965] SCR 503, SC (not folld)
Holroyd v Marshall (1862) 10 HL Cas 191 (refd)
Industrials Finance Syndicate v Lind, Re Lind [1915] 2 Ch 345, CA (refd)
Judicial Manager (L & L) Engineering Corporation Sdn Bhd (under Judicial Management), The v Baiduri Bank Bhd (Civil Appeal No 17 of 2006) (refd)

A *King v Michael Faraday & Partners Ltd* [1939] 2 All ER 478, KBD (refd)
Palette Shoes Pty Ltd (in liquidation) v Krohn (1937) 58 CLR 1 (refd)
Tailby v The Official Receiver (1888) 13 App Cas 523, HL (refd)
Wilmot v Alton and another [1897] 1 QB 17, CA (refd)

B **Legislation referred to**
Bankruptcy Act 1957 [BR] ss 5, 42

Elaiza Merican (Abrahams, Davidson & Co) for the appellant.
Rosli Ibrahim (Janice Abdullah and Nelia Tan with him) (Deputy Public
C *Prosecutor, Attorney General's Chambers) for the respondent.*

Davies JCA:

D **[1]** This is an appeal against a judgment of the High Court given on 12 August 2008 dismissing an originating summons by the Baiduri Bank claiming the following relief against the official receiver:

(a) A declaration that, upon the true construction of a deed of assignment
E dated 12 March 2002 between Kumariah bt Hj Sirat ('Kumariah') and the bank by which Kumariah assigned all her monthly salary to the bank, the bank is the sole and absolute assignee of all of her right, title and interest in the monthly salary paid to her by her employer on and from the date of the deed.

F (b) A declaration that by virtue of being the sole and absolute assignee of all of Kumariah's right title and interest in her monthly salary, the bank is a secured creditor of such sums assigned by her.

(c) A declaration that by virtue of being such secured creditor, the bank is
G entitled to retain as again the official receiver such sums assigned pursuant to the deed.

(d) In the alternative, a declaration that as and when she receives her monthly salary from her employer, Kumariah holds it as trustee for the bank.
H

(e) A declaration that by virtue of Kumariah holding all such sums as trustee, such sums do not comprise property of the debtor within the meaning of the Bankruptcy Act.

I **[2]** By a letter dated 12 March 2002 the bank offered two credit facilities to Kumariah on the stated security, respectively, of 'Assignment of Monies due under BSP Annual Bonus' and 'Assignment of Monies due under salary'. The letter was countersigned, by way of acceptance, by Kumariah. On the same day the deed of assignment dated 12 March 2002 was executed by

Kumariah, as assignor, and the bank as assignee. It contained the following terms:

(a) The assignor has applied for a banking facility from the assignee bank and the assignee bank has approved the said application subject to the terms and conditions contained in the assignee bank's facility offer letter to assignor.

(b) It is a condition of the granting of the said loan application by the bank that the assignor shall assign his full monthly salary… and in the event of any subsequent change in the employment of the assignor, the assignor's salary with any such subsequent employer.

(c) The assignor hereby agrees, undertakes and covenants by virtue hereof that he shall assign all his future monthly salary without deduction by other financial institutions with *BSP Co Sdn Bhd* (current employer) in favour of the assignee bank and shall instruct his employer to credit his monthly salary into his account with the assignee bank.

(d) Further, the assignor hereby agrees, undertakes and covenants that in the event of any subsequent change in his employment, the assignor shall duly inform the assignee bank in writing immediately upon the occurrence of any such change and shall instruct his new employer to credit his monthly salary into his account with the assignee bank.

(e) For the avoidance of doubt, this deed of assignment shall govern present and any future salary of the assignor in the event of any subsequent change in the assignor's employment.

[3] The salary to which the deed referred was future monthly salary expected to be earned by Kumariah in her then capacity as a user registration officer with the BSP Co and any other future salary which she might earn with another employer.

[4] On 2 April 2003 Kumariah committed an act of bankruptcy and on 28 February 2004 a receiving order pursuant to s 5 of the Bankruptcy Act was made against Kumariah in consequence of which the official receiver was thereby constituted receiver of her property. On 24 August 2006 she was adjudged bankrupt in consequence of which her property became divisible among her creditors and vested in her trustee, in this case the official receiver, for that purpose. By s 42 of the Act the bankruptcy was deemed to have relation back to and commence at the time of the act of bankruptcy being committed on which the receiving order was made.

[5] The principal question which came before the court and this court is whether salary earned by or paid to Kumariah after the date of that act of bankruptcy vested in her trustee and so became divisible among her creditors

A or whether it was the property of the bank pursuant to the deed of assignment. The principal argument of the bank in the court below and in this court was directed to showing that, by virtue of the deed, the bank became a secured creditor of the assignor. But that could be so only if, by virtue of the deed of assignment, future salary, immediately upon coming B into existence, was the equitable property of the bank, at least by way of security. That is why the question which we have stated is the principle question which we must decide.

C **[6]** This court stated and applied the correct principle in *The Judicial Manager (L & L) Engineering Corporation Sdn Bhd (under Judicial Management) v Baiduri Bank Bhd* (Civil Appeal No 17 of 2006). In that case we said:

D > At law, future property was incapable of assignment. But the position was otherwise in equity. A promise, made for consideration, to assign future property, such property being capable of ascertainment or identification, operated to bind the conscience of the assignor and to bind the property itself from the moment when the contract becomes capable of being performed.

E **[7]** We then proceeded to set out the principle in more detail by reference to the judgment of Dixon J in *Palette Shoes Pty Ltd (in liquidation) v Krohn* (1937) 58 CLR 1. We do not think it necessary to repeat that here. However we do think it necessary to refer to two of the authorities referred to in the passage which we quoted in that case for two reasons. The first is that they F have long been accepted, together with *Holroyd v Marshall* (1862) 10 HL Cas 191 as the leading authorities on this principle. And the second is that they are both cases in which the dispute was between an assignee of future property and the official receiver. They are *Tailby v The Official Receiver* (1888) 13 App Cas 523 and *Re Lind, Industrials Finance Syndicate v Lind* G [1915] 2 Ch 345.

[8] In *Tailby,* the House of Lords held that an assignment by way of mortgage, before the assignor's bankruptcy, of future book debts of the assignor, unlimited to any business, was effective against the official receiver H to pass to the assignee an equitable interest in those book debts arising after that bankruptcy immediately that they arose.

[9] In *Lind*, the English Court of Appeal held that an assignment by way of mortgage, before the assignor's bankruptcy, of an expectant share in an I

estate was effective against the official receiver to pass to the assignee an equitable interest in that share when it arose after the bankruptcy.

[10] At first glance, the facts in *Tailby* appear to assist the appellant's argument here. However the book debts referred to there must have been book debts arising from contracts entered into by the bankrupt before his bankruptcy because his bankruptcy would have prevented him from carrying on business thereafter. Consequently no further act was required by the assignor after the bankruptcy to perfect the assignee's title to those book debts. Here, by contrast, the property which the bank claims is salary earned pursuant to contracts entered into by Kumariah after her bankruptcy.

[11] In *Lind*, also, no further act was required by the assignor, after assignment, to perfect the assignee's right to the expectancy.

[12] Ms Merican, for the appellant bank, therefore sought to rely on the decision of this court in *The Judicial Manager (L & L) Engineering Corporation Sdn Bhd (under Judicial Management) v Baiduri Bank Bhd* referred above in which the money in dispute was earned after the appointment of the judicial manager. There are, however, two relevant differences between that case and this.

[13] The first of these arises from the essential difference between the effect of appointment of a judicial manager under the Emergency (Companies Act) (Amendment Order) 1998, as occurred there, on the one hand and, on the other, appointment of a trustee under the Bankruptcy Act 1957, as occurred here. Upon appointment of a judicial manager under the former *order*, the property of the company remained in the ownership of the company although the judicial manager was given certain powers over it. There the judicial manager, as agent of the assignor, chose to complete the two construction contracts the moneys under which were the subject of an earlier assignment. However, on Kumariah's bankruptcy, her property was vested in the official receiver, as trustee for her creditors, from the date of the act of bankruptcy.

[14] The second, and more important difference lies in the nature of the property the subject of the purported assignment in each case. In the first case it was future income under two existing contracts. Consequently, at the time of appointment of the judicial manager, there were existing contractual rights to that income though it was to be earned in the future. Because these contractual rights were in existence and had been effectively assigned, nothing

A further was required to be done by the purported assignor to secure those rights to the assignee. Consequently if and when those contractual rights produced property the subject of the purported assignment (the payments under those contracts) it became the property of the assignee. And it produced such property, the money in dispute, when the judicial manager B chose, on behalf of the company, to complete those contracts.

[15] Here, by contrast, because, by its very nature, salary income from personal exertion is earned under a series of periodic contracts of short duration, in this case of one month each, Kumariah was employed from C month to month. And it followed from this that, except for a monthly contract which may have been in the course of being performed at the time of her act of bankruptcy, the property the subject of the purported assignment was of future income under future contracts. Not only was the property the subject of the assignment future property but the right to it D would also not arise until some time in the future and then only if the assignor chose to enter into such future contracts by continuing or changing her employment. In other words, to secure the right to the property the subject of the purported assignment, future salary, if any, required further acts by the purported assignor.

E

[16] It is of the essence of the equitable principle on which these cases are based — that equity considers as done that which ought to be done — that, in order that an assignment of future property be effective, there must be nothing further required to be done by the assignor to perfect it. In *Tailby*, F for example, Lord Macnaghten spoke of 'equitable assignment … where nothing remains to be done in order to define the rights of the parties *or to give effect to those rights*' at p 547. The underlining is ours. See also *Lind* per Swinfen Eady LJ at p 360.

G

[17] Here that was not the case. As already mentioned, in order to create the right to the income the subject of the assignment, Kumariah had to choose to continue in or change employment.

H **[18]** An additional problem which the bank faced here was that bankruptcy intervened before Kumariah could enter into those contracts. The consequence of bankruptcy, even on existing rights to income is explained in the following in the judgment of Rigby LJ in *Wilmot v Alton and another* [1897] 1 QB 17 at p 22 as follows:

I

> Where a person who has entered into contracts in the course of his business ceases to carry on business on account of bankruptcy, there is an important distinction,

for the present purpose, between cases in which, the consideration for the contract having been wholly executed by the bankrupt on his part, a sum of money becomes due to him under the contract, and cases of executory contracts in which the money will not be earned under the contract unless the person contracting continues to carry on business and fully performs his part of the contract which has only been partially performed at the date of the bankruptcy. In the latter class of cases the bankrupt cannot create greater rights in favour of an assignee from him than he has himself; it rests with the trustee to say whether the business is to be carried on and the contract performed or not, and, if he elects to perform it, he has a right to the consideration for such performance when it becomes due.

[19] See also *Re Collins, ex parte Salaman* [1925] 1 Ch 556 at p 563; *Re Trytel, ex parte Trustee of the Property of the Bankrupt v Performing Right Society and Soundtrac Film Co* [1952] 2 TLR 32 at p 35. In *Re de Marney, Official Receiver v Salaman* [1943] 1 All ER 275, Farwell J applied this reasoning to income from personal exertion.

[20] It follows that, for both of the above reasons, the deed of assignment was ineffective, against the official receiver to assign any part of salary earned after the act of bankruptcy. If it was ineffective to assign future salary it could not make the bank a secured creditor of Kumariah, in respect of that salary, at the date of her bankruptcy. For the bank to be a secured creditor there must have been property of Kumariah, at the time of her bankruptcy, to which such security could attach. That could of course, under the above doctrine, include an equitable right to future property for which value has been given. But here there was in existence at the time of bankruptcy, no such equitable right in respect of future income, if any, and none would arise until future monthly contracts were entered into.

[21] We regret that, in reaching this conclusion we differ from the Supreme Court of Canada who, in *Holy Rosary Parish (Thorold) Credit Union Ltd v Premier Trust Co* [1965] SCR 503, reached a contrary view. In doing so they followed *King v Michael Faraday & Partners Ltd* [1939] 2 All ER 478 a decision in the King's Bench Division of the High Court of England and Wales. In that case Atkinson J, in purporting to follow *Tailby* and *Lind*, it seems to us with great respect, failed to appreciate that, for an assignment of future property to be effective in equity, there must be no further act required by the assignor to perfect the assignee's right to that property. In following that decision we think, with no less respect, that the Supreme Court of Canada fell into error.

[22] The learned judge was therefore correct in dismissing the originating summons.

ORDERS

(a) Dismiss the appeal.

(b) Unless by the appellant applies to the contrary before Saturday, 23 May 2009 order that the appellant pay respondent's costs of this appeal.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon